

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 EDC 0938**

FINAL DECISION
ORDER OF DISMISSAL

UPON CONSIDERATION of the record in this case, the undersigned Administrative Law Judge hereby makes the following which shall be findings of fact and conclusions of law.

1. The Petition describes a recent incident where Petitioner, *Student* “was suspended from the school bus due to spitting on someone.” This follows a belief by the parent of *Student* that the Respondent school system wanted “to single us out and see my family in trouble.” The Petition also states that *Student*’s school “has issues with non-white families and their kids,” and that, in describing an incident, “the teacher was only paying more attention to white kids.”
2. The subject of the Petition, *Student*, a minor, though described in the Petition as a slow learner, is not a child with special needs as defined in Article 9 of Chapter 115C. Further, the Petition does not allege dispute with the identification, evaluation, placement or services for a child with special needs under IDEA. As such, Petitioner must look to the other Articles of Chapter 115C of the North Carolina General Statutes for the review process for disciplinary matters.
3. Jurisdiction over contested cases is conferred on the Office of Administrative Hearings (OAH) by the Administrative Procedure Act (APA). North Carolina General Statute (G.S.) Chapter 150B. The APA defines “contested case” as an administrative proceeding to resolve a dispute “between an agency and another person.” G.S. § 150B-2(2). The APA expressly

excludes local units of government from the definition of “agency.” G.S. § 150B-2(1a).

4. Respondent Charlotte Mecklenburg Board of Education is a local unit of government and therefore is not an “agency” under the APA. *See* G.S. §§ 115C-35 (providing manner in which local boards of education shall be constituted); 115C-40 (providing that local board of education is a body corporate); 115C-42 (providing that local boards of education may secure liability insurance and thereby waive governmental immunity); 115C-45(c) (providing that appeals may be made to the local board of education from the decisions of school personnel).
5. Local boards of education shall adopt policies governing conduct of students and shall establish procedures that school officials must follow in suspending or expelling students, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment. G.S. § 115C-391(a). The decision of a school principal to suspend a student in excess of ten days may be appealed to the local board of education. G.S. § 115C-391(c). A decision of the local board of education upon a student disciplinary matter is a final decision that “is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. A person seeking judicial review shall file a petition in the superior court of the county where the local board made its decision.” G.S. § 115C-391(e).
6. Though not specifically stated, Petitioner implies racial discrimination under Section 504 of the Rehabilitation Act. In accordance with North Carolina General Statute §150B-1(e), the contested case provisions of Chapter 150B do not apply to “hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated there under.” As such the OAH and the Undersigned lack jurisdiction to hear and act on matters regarding discrimination under Section 504.
7. The claims raised by Petitioner’s Petition for a Contested Case Hearing filed January 26, 2011 should be dismissed pursuant to Rules 12(b) of the N.C. Rules of Civil Procedure, because the Office of Administrative Hearings (OAH) lacks subject matter jurisdiction over such claims.
8. “Questions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court.” *Forsyth County Bd. of Social Services v. Division of Social Services*, 317 N.C. 689, 346 S.E.2d 414 (1986) (citations omitted). *Williams v. New Hanover County Bd. of Educ.*, 104 N.C.App. 425, 409 S.E.2d 753 (1991) (*quoting Harrell v. Whisenant*, 53 N.C.App. 615, 281 S.E.2d 453 (1981)).
9. Where it is obvious that the Court lacks the authority to hear a matter, the Court is precluded from exercising its jurisdiction and is therefore obliged to dismiss the case. *Lovern v. Edwards*, 190 F.3d 648 (4th Cir.1999).

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the findings of fact and conclusions of law noted above. It is hereby **ORDERED** that this contested case be **DISMISSED with prejudice**.

NOTICE

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This is a Final Decision pursuant to N.C. GEN. STAT. § 150B-36(c).

IT IS SO ORDERED.

This the 14th day of February, 2011.

Augustus B. Elkins II
Administrative Law Judge